Supreme Court
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No. 09-1343

IN THE

Supreme Court of the United States

J. Mc INTYRE MACHINERY LTD.,

Petitioner,

v.

ROBERT NICASTRO and
ROSEANN NICASTRO, h/w,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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PRELIMINARY STATEMENT

J. McIntyre Machinery Ltd. ("J. McIntyre") respectfully submits this Reply in support of its Petition for a Writ of Certiorari to the Supreme Court of New Jersey.

Far from simply "reaffirming" this Court's prior rulings, as Respondents contend, the New Jersey Supreme Court in *Nicastro v. McIntyre Machinery America, Ltd.*, 201 N.J. 48, 987 A.2d 575 (2010), announced a new, unrestrained approach to the stream-of-commerce theory of personal jurisdiction. That new doctrine, requiring nothing more than marketing a product to the United States, and what it portends for both foreign and domestic defendants' constitutional due process rights, renders this an important decision deserving of this Court's review. In an unavailing effort to avoid acknowledging the lower court's fundamental alteration of a defendant's due process rights, Respondents mischaracterize the lower court's ruling as following this Court's precedents, and suggest that there may exist a host of facts to be considered, none of which the lower court deemed necessary to render its decision.

Respondents also oppose the Petition by arguing that this case might possibly be rendered moot at some future time. Respondents have the power to end this case at any time: by dropping the remanded lawsuit in New Jersey state court and by withdrawing their claim in the pending United Kingdom liquidation proceedings. Respondents, after all, are plaintiffs and the key to mootness is in their hands. Respondents, by evidence

of their own opposition to this Petition, are eager claimants; rendering the lawsuit moot appears to be the furthest thing from their minds.

Finally, Respondents assert that this Court lacks jurisdiction, and choose not to discuss, much less distinguish, the case law supplied by Petitioner in support of this Court's ability to hear this matter if it so decides.

ARGUMENTS IN REPLY

I. The Lower Court's New And Extraordinary Expansion Of The "Stream-Of-Commerce" Theory Of Personal Jurisdiction Is Inconsistent With The Limits On That Doctrine That Have Been Articulated By This Court.

In their opposition, Respondents at once seek to deny the novelty and expand the factual basis for the lower court's decision. Respondents state that the decision "merely comports" both with Justice O'Connor's "Stream-of-Commerce-Plus" approach requiring a finding of purposeful conduct ("plus" factors) specifically directed toward the forum, and Justice Brennan's requirement of actual awareness that a product be marketed in the specific forum state, as set forth in their competing plurality opinions in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 112-117 (1987); (Opp. Brf., 18). Respondents misapprehend the New Jersey Supreme Court's holding in this case, which that court claimed was a response to a "radically transformed" international economy. (App. 35a). Contrary to Respondents' arguments of conformity with this Court's precedent, the lower court's assertion of radical change is

recognition of the fundamental transformation that it understood it was making in the law of due process and personal jurisdiction.

Respondents also assert a plethora of random facts, which, even if true, were not a part of the New Jersey Supreme Court's reasoning or holding and are thereby irrelevant to this Court's consideration of the Petition.[1] For purposes of its new interpretation of the stream-of-commerce theory, the lower court relied on but two findings: 1) that J. McIntyre marketed to the United States; and 2) that a J. McIntyre machine was purchased by a New Jersey resident. Based on nothing more than those facts and relying on its judicially-noticed discovery of a new "world market," (App. 1a), the court below found jurisdiction over J. McIntyre. Petitioner need not have taken any actions related to New Jersey or even thought about it, a far cry from either plurality in *Asahi*. The lower court's holding explicitly dispensed with a finding of defendant's specific connection with the forum, be it by intentional conduct or through awareness.

This Court, in both *Asahi*, *supra*, and *World Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), focused on a defendant's minimally-directed activity, contacts

1. On the rare occasion when Respondents address a fact considered by the lower court, they misrepresent what that court found. Contrary to Respondents' contention that J. McIntyre "firmly controlled" the Ohio-based McIntyre Machinery America ("MMA"), (Opp. Brf., 12), the court below found that J. McIntyre and MMA "were distinct corporate entities, independently operated and controlled, without any common ownership." (App. 7a).

with a forum state, or actual awareness of its products in the forum state. Where such activities by the defendant can be established, that defendant can be said to have been given "fair warning" of suit, and requiring it to answer a suit there comports with due process. *See Asahi*, 480 U.S. at 112-17; *Burger King v. Rudzewicz*, 471 U.S. 462, 474 (1985); *World Wide Volkswagen*, 444 U.S. at 297-98. Where such activities are lacking, however, a "stream of commerce," without more, is not enough to satisfy due process and sustain an exercise of jurisdiction over the defendant. *World Wide Volkswagen*, 444 U.S. at 298-99.

Here, the lower court made no pretense of finding minimally-directed activity toward New Jersey. It completely dispensed with that requirement as an "outmoded construct of personal jurisdiction," (App 35a), and required only that J. McIntyre sold products generally in the United States and that there was a New Jersey resident who purchased the product. None of the alleged facts that Respondents argue square *Asahi* with the lower court's approach were relied upon by the lower court, and form no part of its decision, its holding, or of its extension of jurisdiction over Petitioner.

The lower court's new approach was groundbreaking. It understood that. The dissent understood that. And, on this point, Petitioner agrees. Only Respondents disagree. They are wrong.

II. Respondents Continue To Pursue Petitioner Before The Courts Of New Jersey And In The United Kingdom, Rendering By Their Own Actions This Case As Appropriate For This Court To Hear.

Respondents contend that the question of New Jersey's exercise of personal jurisdiction over Petitioner "may become moot," (Opp. Brf., 12), and because of this possibility, they argue that this case is not a suitable vehicle for this Court to exercise its jurisdiction. This argument fails for several reasons, not the least of which is its utter vagueness.

First, J. McIntyre is not dissolved. The company continues to exist today as an entity that is seeking this Court's review and defending the trial court litigation on remand in the Superior Court of New Jersey. J. McIntyre remains answerable for claims against it.

Second, even as Respondents belittle Petitioner's juridical health for purposes of this Court's review, Respondents express a much different approach to Petitioner when it comes to their own interests. Respondents are actively pursuing their claims in the instant litigation on remand to the New Jersey trial court, and, through British counsel, they have filed their own proof of loss against J. McIntyre with the liquidator in the United Kingdom. Respondents' argument against this Petition requires that this Court ignore Respondents' own conduct, which is directed towards securing a recovery against Petitioner on two fronts, including before this Court.

While Respondents argue on the one hand that the case is an inappropriate vehicle for certiorari because it may—somehow, someday, in some country eventually become moot, they also argue that were J. McIntyre to "prevail on the merits, the issue of personal jurisdiction will become academic." (Opp. Brf. 13). Respondents' argument against review because J. McIntyre may prevail on the merits fundamentally conflicts with their suggestion that the specter of mootness renders this case ultimately futile. Respondents do not suggest that the Petition does not present a case or controversy under the Constitution, and Petitioner urges that this Court take its cue from Respondents' own determination and accept review of the case by granting the instant Petition.

III. The Lower Court's Final Decision To Exercise Personal Jurisdiction Over J. McIntyre Under A New Theory Of Stream-Of-Commerce Is Subject To The Exercise Of This Court's Certiorari Jurisdiction.

The New Jersey Supreme Court's judgment finding personal jurisdiction over J. McIntyre is sufficiently final to warrant this Court's immediate review of the matter pursuant to 28 U.S.C. § 1257(a) and *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 485 (1975). (*See* Pet., 2). Although this case was remanded for further proceedings on the merits, the federal constitutional issue of personal jurisdiction over J. McIntyre was adjudicated to finality and is not subject to further review by the New Jersey courts. This Court has granted review in these very circumstances, finding that a state court judgment involving an important federal

issue is final even though "there are further proceedings in the lower state courts yet to come." *Cox*, 420 U.S. at 485; *see also Shaffer v. Heitner*, 433 U.S. 186, 195 (1977); *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159-64 (1973).

In *Cox*, this Court granted immediate review of a state court judgment that upheld the First Amendment constitutionality of a statute authorizing suit against the press for publishing the name of a rape victim. Although the Georgia Supreme Court had remanded the case for trial on the merits, this Court found Section 1257(a)'s finality requirement satisfied because the state court judgment was "plainly final on the federal issue" and "not subject to further review in the state courts." This Court held that while the *Cox* appellants might have prevailed on non-federal grounds, if the state court had erroneously decided the matter "there should be no trial at all" because this Court could find that the statute in question was unconstitutional and thus terminate the litigation. *Cox*, 420 U.S. at 485-86. Accordingly, this Court granted review, noting that a failure to decide the question would leave the press in a state of legal and constitutional uncertainty while the lower court proceedings were pending. *Id.* Here, as in *Cox*, all the predicates for a finding of finality are present, and if the lower court is wrong, Petitioner should face no trial at all.

Shaffer v. Heitner, *supra*, is consistent with *Cox* and procedurally analogous to this case. In *Shaffer*, nonresident defendants were seeking immediate review of a state court's exercise of personal jurisdiction over them, despite their claim that they had no contacts with

the forum state. *Shaffer*, 433 U.S. at 194-95. Employing a pragmatic approach, this Court found that the state court's finding of personal jurisdiction over the defendants was sufficiently final for review. *Id.* This Court reasoned that if review were not granted, the defendants would have the impossible choice of suffering a default judgment or entering a general appearance and defending on the merits. *Id.* Substituting the "Georgia" of *Cox* for the "Delaware" in *Shaffer*, this Court ruled:

> "The (Delaware) Supreme Court's judgment is plainly final on the federal issue and is not subject to further review in the state courts. Appellants will be liable for damages if the elements of the state cause of action are proved. They may prevail at trial on nonfederal grounds, it is true, but if the (Delaware) court erroneously upheld the statute, there should be no trial at all."

Id. (quoting *Cox*, 420 U.S. at 486).

As in *Cox* and *Shaffer*, the lower court's order finding personal jurisdiction over J. McIntyre is final for purposes of this Court's review. The judgment was final on the important federal issue of whether New Jersey's courts may require J. McIntyre to defend a New Jersey state lawsuit consistent with due process of law, and the lower court's ruling on jurisdiction is not subject to further review in New Jersey's courts. As in this Court's cases, that J. McIntyre might prevail on the merits at trial does not remove this Court's ability to issue a writ of certiorari to review the judgment below. The finality

rule is satisfied because a finding by this Court that the lower court exceeded the bounds of the Constitution would bring an end to the litigation on the merits. *See Cox*, 420 U.S. at 485; *Shaffer*, 433 U.S. at 195.

CONCLUSION

For the foregoing reasons and those set forth in its Petition, J. McIntyre Machinery, Ltd., respectfully requests that this Court grant its petition for a writ of certiorari to the Supreme Court of the State of New Jersey.

Respectfully submitted,

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